BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA L. MCCULLOUGH Claimant	)	
VS.	)	
WAL-MART Respondent	)	Docket No. 1,026,101
AND	)	
AMERICAN HOME ASSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requests review of the January 9, 2006 preliminary hearing Order Denying Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered a work-related accident but denied compensation because she did not provide timely notice of her accidental injury.

The claimant requests review and argues that after an October 4, 2005 incident at work, where her knee popped as she turned while working, she provided notice but thought her knee pain was related to a previous work-related accident she had suffered in July 2005. Because a physician later noted that the October incident was a new accident, she sent respondent a notice of intent seeking treatment for an October 4, 2005 accident and thus provided notice within 75 days.

Respondent argues the claimant's injury on October 4, 2005, was a new injury and claimant did not provide timely notice of this accident and instead attributed her knee complaints to her previous accident in July 2005. Respondent argues that claimant's just cause argument was not made to the ALJ and, in any event, her October 4, 2005 injury was a specific traumatic event which does not support a just cause argument. Respondent requests the Board to affirm the ALJ's Order Denying Compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The ALJ determined claimant had suffered a work-related accident but further determined she did not provide timely notice. The ALJ concluded that instead of providing notice of the October 2005 accident the claimant had requested medical care for her knee attributing her pain to her previous accident in July 2005.

On July 14, 2005, claimant had slipped at work, twisted her ankle and bumped her knee. She reported the accident and was provided treatment primarily for her ankle. She was placed in an air splint for her ankle and used crutches to ambulate. On August 11, 2005, she was released from treatment with no restrictions.

On October 4, 2005, while working as a cashier, the claimant turned to put a loaded bag into the cart when she heard her right knee pop. Claimant requested medical treatment for her knee pain the same day of the accident. Claimant notified a manager and requested that an appointment be scheduled with the company doctor because of her knee pain. Claimant told the manager that she thought her knee problems might be related to the July 2005 accident and asked if that claim was still open. She was directed to another manager who told her the previous claim was closed. Claimant then sought treatment on her own. Claimant testified:

> Q. (By Mr. Bergmann) Do you remember exactly what you told Sarah with regard to your injury on October 4th?
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> A. I asked her if she could have - - if she could find out if my accident report of July 14th was still open because my knee was hurting. And she said I would have to talk to Barbara Gann (spelled phonetically), who is our office manager. And the next day I called Barbara and I asked her and she found out and said that - - she called me - - it was either that day or the day after saying it was August 11th. So that's when I took it upon myself to see Dr. Hill.
>
> Q. I got lost there in the mix. What was on August 11th?
>
> A. That was when the July 14th case, when I hurt my ankle, was closed.
>
> Q. **Do you remember telling Sarah that your accident of October 4th was related to your previous injury?**
>
> **A. That I thought it could be.**
>
> Q. So as far as you know, it was Sarah's impression from what you told her that she - - that Sarah believed it was related to the July 14th injury?

A. Yes, and that's why she did not refer me.[1] (Emphasis Added)

The manager, Sarah, in a handwritten letter, indicated that claimant had requested medical treatment for her knee and it was hurting from when she fell in her previous accident.[2] It should be noted that use of the phrase "previous accident" arguably would not be necessary if there had not been an allegation or indication of a subsequent accident.

When claimant initially sought treatment on her own on October 6, 2005, at the Flint Hills Community Health Center, she provided a history of injury from a slip and fall in July 2005 noting her ankle was initially worse but that her knee pain had gradually worsened.[3] On October 7, 2005, claimant filled out an accident report for respondent indicating she had injured her knee on July 14, 2005, and as her ankle improved the knee had gradually started hurting.[4]

Claimant was then referred by respondent back to Dr. Brent A. Hrabik who had treated her ankle injury. Dr. Hrabik examined claimant on October 12, 2005, and was provided a history that claimant felt a pop in her knee at work as she was turning and standing at the register at work. But claimant further told the doctor she thought the knee injury and pain was related to her previous injury in July 2005. In his medical record of the visit the doctor concluded:

> Note: I believe this more than likely was a new injury, not something related to past work comp on ankle, it was associated with a foot being planted, rotation at the register and then pop and immediate pain.[5]

The doctor placed restrictions on the claimant because of her right knee. She returned to work on October 12, 2005, in an accommodated job as a door greeter for approximately two weeks. On October 13, 2005, claimant signed a form requesting medical care which she stated the manager filled out the date of injury of July 14, 2005.[6] The claimant explained:

> Q. (By Mr. Bergmann) Now, Ms. McCullough, in both of these documents you do not relate anything to an October injury, is that correct?

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[1] P.H. Trans. (Dec. 2, 2005) at 25-26.

[2] *Id.*, Resp. Ex. E.

[3] *Id.*, Cl. Ex. 1.

[4] *Id.*, Resp. Ex. B.

[5] *Id.*, Cl. Ex. 1.

[6] *Id.*, Resp. Ex. D.

> A. No. Because at the time I filled those out I thought it had to do with my injury in July. That is the reason why that I didn't do that. But on the – when I went to see Dr. Hrabik or Dr. Hill on the 6th and they did the x-rays and I called and talked to Ron, which is my manager, and he said I needed to fill out an accident report.
>
> . . .
>
> Q. But the fact remains that everything on these two documentations relate your injury that you are now alleging October 5th back to July 14th. And, in fact, you just testified that you thought what happened on October 4th was related to your July 14th injury, is that correct?
>
> A. Yes.[7]

On October 27, 2005, the claimant reported to work but was advised not to clock in. She then was told that she could not return to work until she had a doctor's release with no restrictions. The last day the claimant worked for the respondent was October 26, 2005.

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520 requires a claimant provide notice of a work-related accident to his or her employer within 10 days of the date of the accident. The notice must state the time, place and particulars of the accident so as to alert the respondent to the possible work connection to the injury and the potential for a claim.[8] The statute permits the reporting

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[7] *Id.* at 20-21.

[8] See, *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

period to be extended when the employee has "just cause" for not reporting the accident in a timely manner.

The claimant immediately notified respondent of the need for medical treatment for her knee after the October 2005 incident where her knee popped but she believed that the popping incident was caused by her previous accident in July 2005. Accordingly, she told the manager that she thought her pain was attributable to the July 2005 accident. Thereafter, she consistently told the medical providers that she thought the July 2005 accident was the cause for her knee pain which had gradually worsened after her ankle had improved. However, when she saw Dr. Hrabik she recounted the knee popping incident but again attributed her pain to the July 2005 incident. It was Dr. Hrabik who then opined that claimant had suffered a new accidental injury to her knee in the October 2005 incident.

Initially, claimant's response to the question regarding what she told the manager about her injury contains the implication that she notified the manager about the October 4, 2005 accident. As previously quoted, claimant was asked if she remembered telling the manager that her accident of October 4th was related to her previous injury and she responded that she had stated that she thought it could be. It appears claimant in fact told the manager about the October 4, 2005 incident but simply concluded that her knee pain was caused by her previous July 2005 accident, and that would satisfy her requirement to provide notice. Especially when the manager, in her letter recounting what claimant told her makes reference to the previous injury. It seems a reference to a previous injury is not necessary unless there is notice of a subsequent injury. But claimant agreed that based upon their conversation the manager believed her knee pain and request for treatment was related to the July 2005 accident.

The claimant argues that if her conversation with the manager did not satisfy the 10-day notice requirement then there was just cause for any delay in providing notice of the October 4, 2005 accident. Although not intended as an exhaustive list, some of the factors to consider in determining whether "just cause" exists are:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
(2) Whether the employee is aware he or she has sustained either an accident or an injury on the job.
(3) The nature and history of claimant's symptoms.
(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-12-2.

When just cause is an issue, the above factors should be considered but each case must be determined on its own facts.

When claimant suffered the incident where she felt her knee pop she immediately notified respondent that she needed medical treatment. However, in her mind, her knee problem was related to her previous accident in July 2005. Claimant upon first seeking treatment on October 6, 2005, told the doctor that as her ankle improved her knee pain gradually worsened. She then continued to consistently tell the medical providers that her knee pain gradually worsened as her ankle injury from the July 2005 accident had improved. Even when she told Dr. Hrabik about the incident where her knee popped she also continued to maintain that it was related to the accident in July 2005. Again this is consistent with the fact that she stated her knee pain had been gradually worsening. And it was Dr. Hrabik who first concluded the knee popping incident in October was a new accident.

Again, because her knee pain was gradually worsening, the knee popping incident, in claimant's mind, was related back to the July 2005 accident. The history of her symptoms she provided the doctors certainly makes that conclusion plausible. Under these facts and circumstances, claimant had just cause that extended the notice deadline to 75 days following the incident. The claimant's notice of intent letter and application for hearing sent in November 2005 provided respondent notice of the October 4, 2005 date of accident well within 75 days. Accordingly, the ALJ's decision is reversed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.[9]

WHEREFORE, it is the finding of the Board that the Order Denying Compensation of Administrative Law Judge Brad E. Avery dated January 9, 2006, is reversed to find claimant had just cause to extend the notice deadline to 75 days and is remanded for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of March 2006.

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[9] K.S.A. 44-534a(a)(2).